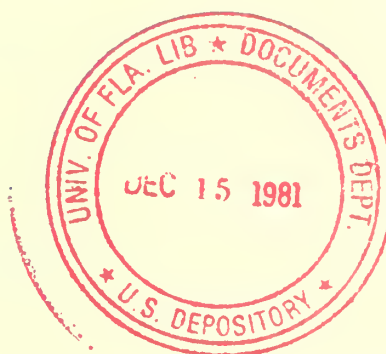


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DIGEST

The **DIGEST** contains summaries of recent orders issued by the United States Merit Systems Protection Board.



SEPTEMBER 1981

Volume 1, No. 12

UNITED STATES MERIT SYSTEMS
PROTECTION BOARD

Washington, D.C. 20419

United States Merit Systems Protection Board

Ersa H. Poston

Vice Chair

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Member

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PREPARED BY: Office of the Secretary, Legal Publications Division

United States Merit Systems Protection Board

Washington, D.C. 20419

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CASE SUMMARIES:

ADVERSE ACTIONS

JAMES BLADE v. U.S. DEPARTMENT OF THE NAVY (Docket No. PHO75299053)

September 11, 1981

Appellant was removed from his position based on a charge that he was away from his assigned work area during working hours without permission. Six prior acts of misconduct were also considered by the agency in removing appellant. In the initial decision, the presiding official sustained the removal action.

In his petition for review, appellant set forth his disagreement with the presiding official's credibility determinations and findings of fact. The Board said that it would not review the credibility findings of the presiding official in this case because the petition did not specify sufficient reasons or evidence to give the Board reason to question the findings. However, the Board said that the petition raised a question as to the appropriateness of the penalty, and it granted the petition for review to consider mitigation of the penalty.

The Board has held that to the extent that an agency's decision to impose a particular sanction rests upon factual considerations, the agency must establish such facts by a preponderance of the evidence, but that the appropriateness of a penalty also involves administrative judgment and discretion. See *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 20, 1981). The standard of review for evaluating such determinations is that of unreasonableness.

The Board said that in this case, although the agency proved the facts relied upon, review of the record and all factors relevant to a determination of the reasonableness of the penalty compelled the conclusion that the penalty of removal was unduly harsh and unreasonable. The Board said that all of the appellant's acts of misconduct were of a minor nature; that there was no evidence that loss of productivity or endangerment of health or safety occurred; and that appellant had a 4½ year record of satisfactory performance, suggesting that he could continue to contribute to the accomplishment of the agency's mis-

sion. The Board concluded, in light of the repetitive nature of the appellant's minor offenses, that a suspension of 30 days was the maximum reasonable penalty in this case. Accordingly, the initial decision was reversed, and the agency was ordered to cancel the removal action and substitute a 30-day suspension.

REGINA C. CONLEY v. DEPARTMENT OF THE TREASURY (Docket No. SF07528010237)

September 18, 1981

Appellant, a seasonal employee, was terminated. In her appeal, she alleged that her termination was motivated by discrimination based on color. The agency contended that appellant was a probationary employee and could only appeal to the Board from discrimination based on partisan political reasons or marital status. In the initial decision, the presiding official found that appellant had completed her probationary period and was entitled to appeal to the Board. He further found that the agency failed to afford appellant the procedural safeguards provided by 5 U.S.C. §7513 and reversed the agency action on the basis of harmful procedural error.

The agency petitioned for review on the ground that the initial decision of the presiding official was based on erroneous interpretation of statute and regulation. The agency contended that: (1) the presiding official violated 5 CFR §1201.57(b) by closing the record on the merits of the appeal without notice to the agency; and (2) the presiding official erred in finding that appellant had completed her probationary period.

In light of its disposition of the case, the Board found it unnecessary to address the agency's first contention. In support of its second contention, the agency submitted several documents which, it asserted, evidence a 1965 agreement between the Internal Revenue Service (IRS), the Civil Service Commission (now the Office of Personnel Management), and the General Accounting Office. The agency contended that pursuant to the agreement, seasonal employees were not to be credited for nonseasonal per-

iods in a nonpay status. The agency contended that the presiding official erred in crediting 22 days in which appellant served in a nonpay status between seasons to her total service. Although the agency acknowledged that those periods would have been creditable under *Federal Personnel Manual* (FPM) chapter 315, Appendix A, it contended that the 1965 agreement granted the agency a waiver from the FPM provision.

The Board noted that at the time of appellant's appeal, the agency was provided an opportunity to file further submissions, including the 1965 agreement, but failed to do so. The agency presented no reason for its failure to submit the agreement. Therefore, the Board noted that evidence of the agreement, although clearly material to the case, did not qualify as new evidence. Nevertheless, the Board, on its own motion reopened the initial decision pursuant to 5 CFR §1201.117, since the agreement might have affected the Board's jurisdiction over the case.

The Board discussed the relevance of the agreement to the case and remanded the case to the presiding official for further processing. On remand, the parties and the presiding official were counseled to address the validity of the 1965 agreement under 5 CFR §5.1 and its effect on appellant's situation. The Board said that if the presiding official again determines that appellant is a non-probationary employee, he must consider what procedures the agency used when discharging appellant.

Accordingly, the petition for review was denied, the initial decision was vacated, and the case was remanded.

**LEO GRANT, Jr. v. UNITED STATES
POSTAL SERVICE** (Docket No. AT07528110102)
September 29, 1981

Appellant was removed based upon charges of: (1) a 4-day period of unauthorized absence; and (2) violation of an agreement entered into by appellant, the union (The American Postal Workers Union), and management. In the initial decision, the presiding official found the charges supported by a preponderance of the evidence and sustained the action.

Appellant contended before the presiding official that his offenses were caused by his alcoholism. In the two years prior to appellant's removal, he used at least 300 hours of approved leave and was disciplined for AWOL offenses. The presiding official found that appellant's frequent absences affected the efficiency of the service because the agency had to locate

replacement employees when appellant was absent. He also found that appellant had attended the agency's program for alcoholic recovery, that his participation had been unsatisfactory, and that he voluntarily withdrew from the program. Appellant petitioned for review under 5 CFR §1201.115.

In his petition, appellant asserted that he did not violate an agreement which stated that further absences without approved leave would be just cause to remove him, because he had only one further absence after the agreement took effect (albeit for 4 days). Appellant also asserted that since medical certification for leave is only required for absences continuing for more than 3 days, he was only AWOL for the fourth day of his absence.

The Board found that the petition consisted of mere reargumentation of the appeal and failed to meet the criteria for Board review under 5 CFR §1201.115(b). Accordingly, the petition for review was denied.

**MATTHEW KNUCKLES v. WILLIAM
BOLGER et al.** (Docket No. SL075209050)
September 1, 1981

This case came before the Board pursuant to a decision of the United States Court of Appeals for the Eighth Circuit, which by opinion and judgment entered on July 20, 1981, remanded the case to the Board for further proceedings consistent with its decision.

Appellant was removed based on a charge of converting postal funds for his own use. The removal was upheld in the initial decision which sustained five of the six specifications of the charge.

Appellant, who had petitioned for review of the initial decision, was acquitted of the criminal charge of conversion in October 1979. The Board remanded the case to the regional office to determine whether mislabeling the charge had substantially prejudiced appellant's rights. The Board had concluded that serious violations of agency accounting procedures had occurred which warranted appellant's dismissal.

In a subsequent decision, the presiding official concluded that the error of mislabeling was not harmful to appellant. In an order dated October 21, 1980, the Board denied review of this decision.

The Court concluded that appellant was not given a full and fair opportunity to defend himself against the newly stated charges, violations of accounting

procedures, and remanded the case to the Board with directions to give appellant an opportunity to respond directly to the charge and to give the Board an opportunity to determine whether appellant had violated such procedures and, if so, the appropriate penalty to be imposed.

Accordingly, the case was remanded to the St. Louis Regional Office for rehearing and reconsideration.

CARL R. MCCURTIS v. U.S. POSTAL SERVICE
(MSPB Docket No. SF075209065)
(EEOC Docket No. 03810049)
September 17, 1981

This case came before the Board pursuant to 5 U.S.C. §7702(c) which provides for Board consideration of United States Equal Employment Opportunity Commission (EEOC) decisions in cases where the EEOC has considered a Board decision at the request of the employee. In a June 8, 1981, decision, the EEOC recommended correction of appellant's personnel records to reflect that he was discharged because he was physically unable to perform his duties.

In a September 14, 1981, letter, the agency informed the Board that all necessary steps had been taken to review appellant's records in accordance with the EEOC recommendations, and that appellant would be informed of such action by the agency.

Accordingly, no further Board action was necessary, and the appeal was rendered moot and dismissed.

NETTIE A. MOORE v. U.S. DEPARTMENT OF THE INTERIOR (Docket No. AT07528110688)
September 18, 1981

Appellant was furloughed for three pay periods (6 calendar weeks). The presiding official dismissed the case, finding that the Board has justification only over those furloughs that do not exceed 30 days. The Board said that the presiding official's finding was erroneous.

The Board reopened and remanded the case to the regional office to consider the application of reduction in force regulations to appellant's furlough and to afford appellant a hearing. The Board said that furloughs for more than 30 days accomplished for any of the reasons specified in 5 CFR §351.201(a) are

appealable to the Board. In determining whether appellant's furlough was a reduction in force appealable to the Board, the regional office was instructed to consider the nature of appellant's appointment and the agency's contention that the furlough was accomplished in accordance with the terms of the appointment. The Board also instructed that if the furlough is found to be a matter within the Board's jurisdiction, the regional office is to adjudicate appellant's claim of race discrimination.

WILLIAM E. PAGE v. VETERANS ADMINISTRATION (Docket No. PH075299075)
September 15, 1981

Appellant was removed based on the charge of absence without leave for 14 days. Appellant's sole defense was that the agency did not take proper notice of his alcoholism. The presiding official found the reason cited for the removal supported by a preponderance of the evidence, said that the action promoted the efficiency of the service, and affirmed the agency's action.

Appellant petitioned for review, alleging that a person who suffers from a disease (alcoholism) should be retired for disability rather than removed. The Board granted the petition to consider the case in light of its decision in *Ruzek v. General Services Administration* MSPB Order No. SL075209017 (August 20, 1981). The Board noted that the presiding official fully explored the agency's treatment of appellant's alcoholism and its attitude toward the problem. The Board found that the agency had afforded appellant several opportunities for rehabilitation of his alcoholism and that appellant was given reasonable accommodation for his handicapping condition as outlined in *Ruzek*.

The Board found that the question of appellant's retirement was not relevant to the removal action since he raised no specific violations with regard to the matter and because the Office of Personnel Management, rather than the employing agency, or the Board, makes the initial determination on the application.

SARAH E. REMY v. VETERANS ADMINISTRATION (Docket No. SL075209045)
September 18, 1981

The presiding official sustained the removal of appellant who was charged with violating Veterans Administration (VA) regulations barring: (1) criminal, infamous, dishonest, immoral or notoriously disgraceful conduct; and (2) threatening injury to and using

abusive language toward another employee. Allegedly, appellant telephoned another employee during off-duty hours, using abusive or obscene language and threatening injury.

Petitioning for review, the appellant alleged the initial decision was based on incorrect interpretation of statute and regulation because the agency failed to support its case by a preponderance of the evidence; that the presiding official improperly admitted and considered—over the appellant's objection—evidence in a matter involving appellant's husband; that the presiding official improperly shifted to appellant the burden of persuasion that someone else had made the calls; that the presiding official failed to consider a stipulation between the parties about the ease of access to appellant's phone line through the lines on the outside of appellant's home; and that the agency did not establish that appellant's phone was on a private rather than a party line.

Discussion of the case background showed that a physician at a VA hospital received harassing phone calls at her home. After several months, she sought police help, and calls were traced to appellant's number. Her household included her husband and teen-age son. Appellant had worked at the hospital from 1944 until being terminated in 1980. She had not worked with the complainant.

Appellant's husband had worked at the hospital until his retirement in 1980; earlier, he had been reprimanded verbally for allegedly encouraging a female patient with problems controlling sexual desire to kiss a male patient. This patient was in the complaining physician's ward.

Appellant was acquitted of the criminal charge of harassment in violation of state law, and then removed from her job at the hospital.

The presiding official found that the agency proved that one phone call came from appellant's household, that a woman had made the call, and that since appellant was the only female in the house, she was the caller.

The Board found that the presiding official misapplied 5 U.S.C. §7701(c)(1)(B), which requires an agency to prove charges by a preponderance of evidence, and that he incorrectly placed the burden on the appellant to show that someone else made the call.

The Board said that it was satisfied that the call was placed from appellant's home telephone. However, it

found that the voice had not definitely been identified as being female. The Board also considered affidavits which attested to appellant's character and claimed it was not her habit to use obscene language.

Pointing to its decision in *Weaver v. Department of the Navy*, 2 MSPB 297, where it held that it is free to substitute its own determinations of fact for the presiding official's, "giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning." The Board found that the caller had not been identified either as the appellant, or as having a woman's voice, that other members of her household could have made the calls, that the showing that the appellant might have had a motive to dislike the physician was weak—and could have applied to any member of her household. The Board noted the appellant's high level of credibility, her established character trait and undisputed habit not to use obscene or profane language and found that the agency had failed to prove by a preponderance of the evidence that appellant had made the telephone calls. The petition for review was granted and the initial decision and agency action were reversed.

NORMAN SCOTT v. DEPARTMENT OF THE NAVY (Docket No. SF075209153)
September 28, 1981

Appellant, a GS-9 electronics technician, was selected for the position of GS-10 electronics technician. A Standard Form (SF) 52, Request for Personnel Action was prepared for the action, listing August 12, 1979, as the effective date. On August 16, the agency notified appellant that the offer of the promotion had been withdrawn and he was advised that he would be given due consideration in a subsequent selection for the position.

Appellant appealed the cancellation to the Board's San Francisco Regional Office, arguing that he had served in the position for four days, that the cancellation was a demotion, and he was entitled to appeal the action to the Board under 5 U.S.C. §7512. The agency argued that the promotion never took place because it was canceled prior to the execution of the Standard Form 50, Notification of Personnel Action. The presiding official found that with the exception of the execution of the SF-50, all acts to effect the promotion had been completed. He therefore held that the SF-50 is a record of a personnel action rather than the action itself, and that appellant's promotion was effective on August 12.

In its petition for review, the agency argued that appellant's promotion was never effected because the SF-50 is the final and necessary act for an appointment in the federal government to be effective.

The Board noted that it could not agree with the agency's contention that the execution of an SF-50 is always and absolutely necessary for a personnel action to take place. The Board discussed the case law and personnel practices of federal agencies concerning the execution of the SF-50 form at length. The Board determined that the actions necessary to effect appellant's promotion were completed, and, since the appellant had entered on duty and performed in the position for four days, the appointment could not be revoked.

Accordingly, the initial decision was affirmed as modified. The agency was ordered to furnish evidence that it has rescinded the cancellation of appellant's promotion.

SAMUEL WASHINGTON v. TENNESSEE VALLEY AUTHORITY

(Docket No. AT07528110106)

September 2, 1981

Appellant was removed for possession of a firearm on agency property. Although appellant admitted the charge, he contended that the penalty of removal was too severe and that other employees charged with the same offense had received less severe penalties. The presiding official concluded that while the agency had proven the reasons for appellant's removal, the penalty or removal was too harsh. He reversed the agency action.

In determining the appropriateness of the penalty, the presiding official noted that two categories of employees worked at this Tennessee Valley Authority (TVA) plant, Trades and Labor (TL) employees and annual employees, and that the agency applied its job rules to TL employees. The presiding official held, after a discussion of the differences between the two types of employees, that the agency had a rational reason for subjecting TL employees to job rules while not applying these rules to annual employees. The presiding official concluded, however, that the agency's reasons for prohibiting firearms applied to all employees and found that the penalty of removal was not appropriate in this case.

The agency petitioned for review, arguing that it had adopted a new policy, prior to the search of appellant's vehicle, requiring the discharge of an

employee for possession of firearms on agency property. The agency further argued that since adopting the new policy, five TL employees who violated this job rule were removed.

The Board said that there was no question that appellant's offense was serious and that the agency has an obligation to protect the security of the plant and the safety of its employees. However, the Board found that since the adoption of the new policy, all TL employees who violated the rule had been terminated, but two annual employees who violated the rule received warning letters. The Board found that the agency did not apply its job rules consistently. The Board granted the petition for review, and affirmed the presiding official's decision reversing the removal. The Board modified the recommended corrective action by substituting a permanent letter of warning for the removal.

CORDELL P. WILLIAMS v. UNITED STATES POSTAL SERVICE (Docket No. PH07528010165)

September 29, 1981

Appellant was removed based on charges of reporting for duty while under the influence of alcohol, failing to notify the agency of his inability to report for duty as scheduled, and being absent from duty without permission (AWOL) on the day prior to that on which he reported for work under the influence of alcohol. In the initial decision, the presiding official affirmed the agency's action, finding that it was supported by a preponderance of the evidence. The presiding official also determined that although appellant was a qualified handicapped person within the meaning of 29 CFR §1613.702(a) and (f), he failed to meet his burden of establishing as an affirmative defense that the agency's action was based upon discrimination. The presiding official further determined that the agency, by referring appellant to a rehabilitation program and allowing him more than one year to demonstrate that he could meet his job responsibilities satisfactorily, accommodated the needs of appellant pursuant to 29 CFR §1613.704(a).

Appellant petitioned for review, challenging the factual determination of the presiding official regarding the agency's actions taken to accommodate his handicap. The Board noted that the agency did fulfill its obligation to appellant by referring him to a rehabilitation program, allowing him extensive sick leave to complete this program, and delaying his removal to provide him with an extended opportunity to correct his deficiencies. The Board determined that the

agency accommodated appellant within the meaning of 29 CFR §1613.704. Accordingly, the petition for review was denied.

PERFORMANCE RELATED ACTIONS

CHINYOUNG L. CHO v. DWIGHT DAVID EISENHOWER ARMY MEDICAL CENTER

(Docket No. AT043209005)

September 9, 1981

Appellant was denied a within-grade increase and subsequently removed from her position as a medical officer based on charges of unacceptable performance. Appellant appealed those actions to the Board (or its predecessor agency) and alleged that the removal and the denial of the within-grade increase were discriminatory acts in violation of Title VII of the Civil Rights Act of 1964, as amended.

In an initial decision, Administrative Law Judge Paul E. Weil found in favor of the appellant and overturned the denial of the within-grade increase and the removal. The medical center petitioned for review of the initial decision. Because of its decision in *Wells v. Harris*, 1 MSPB 199, which was issued after the initial decision, the Board granted the petition for review.

The Board discussed the procedural background and adopted and incorporated all of the Administrative Law Judge's (ALJ) factual findings. The Board discussed the issues surrounding the denial of appellant's within-grade increase and agreed with the ALJ's conclusion that the denial was arbitrary and could not be sustained.

The Board discussed the removal action at length and agreed with the ALJ that there was a violation of Title 29 CFR §1607.11. The Board said that the use of standards applied only to a member of a minority group and not to all employees constituted evidence of discriminatory intent. The Board noted that the facts in this case clearly established that appellant was subject to such arbitrary standards relating to time, attendance, and productivity and that she was judged by subjective criteria which the ALJ concluded did not allow for a fair evaluation of her work. The Board affirmed the ALJ's determination that appellant's removal was the result of unlawful racial discrimination.

The appellant also contended that the agency's failure to afford her necessary training and counseling to remedy perceived deficiencies in her per-

formance constituted a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(1). The ALJ agreed with appellant's contention. The medical center however, contended that this conclusion was erroneous, and the Board agreed, noting that failure to provide training did not constitute a prohibited personnel practice. *Wells v. Harris*, 1 MSPB 229. The Board also held that the ALJ's error of law on this point was decisionally insignificant because appellant proved that her removal was based on prohibited discrimination.

The Board granted the petition for review and affirmed the initial decision as modified.

REDUCTIONS IN FORCE

BETTY FOSTER v. DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD

(Docket No. DC03518010158)

September 29, 1981

Appellant was reduced in grade by reduction-in-force (RIF) procedures. In the initial decision, the presiding official sustained the agency's action. Appellant petitioned for review, alleging that the presiding official erred in finding proper and non-discriminatory the agency's invocation of RIF procedures. The petition for review was granted.

The Board noted that the RIF was undertaken for a legitimate management reason—shortage of funds. The Board discussed the issue of appellant's competitive level at length and agreed with appellant that the agency failed to prove that it defined her competitive level correctly. The Board said that appellant's position was not so unique as to justify a one-position competitive level, but said that the record did not reveal what the proper definition of appellant's competitive level should have been. For this reason, the Board said it was unable to determine whether the agency would have arrived at the same decision had it correctly defined appellant's competitive level. Accordingly, the Board found that the agency failed to prove, by a preponderance of the evidence, that it afforded appellant all of the rights to which she was substantively entitled.

Accordingly, the initial decision was reversed and the agency's action was not sustained.

SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

LAWRENCE S. MATTSON v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. CH073199001)
September 21, 1981

Appellant applied for a position with the Civil Service Commission, (now the Office of Personnel Management) and, after a suitability investigation, it was determined that he was ineligible for the position under 5 CFR §731.202(b)(1) and (5) because of his delinquency or misconduct in prior employment and habitual use of intoxicating beverages to excess. In the initial decision, the presiding official dismissed the appeal on the grounds that OPM had proved by a preponderance of the evidence that appellant's past conduct warranted a finding of unsuitability for federal employment.

The appeal was reopened by the Vice Chair on June 29, 1979, and both the appellant and OPM were ordered to submit briefs, which the Board considered. The Board discussed both appellant's situation and the applicable rules and regulations concerning suitability determinations at length. The Board also addressed appellant's claim that he was discriminated against because of his alcoholism. The Board said that appellant did not rebut OPM's showing of a legitimate non-discriminatory reason for his ineligibility rating, and, therefore, had not carried his burden of proving his ineligible rating was based on a prohibited personnel practice.

Accordingly, the Board affirmed the initial decision as modified and sustained OPM's determination to rate appellant ineligible because of his delinquency or misconduct in his prior employment and his habitual use of intoxicating beverages to excess. The Board noted, however, that this disposition does not preclude the appellant from re-applying to OPM for the same or another position with documentation of rehabilitation.

MARTIN S. STEWART v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DC073109001)
September 30, 1981

Appellant became the subject of an Office of Personnel Management (OPM) suitability determination when he applied for a position and acknowledged that he had been fired from two positions within the previous five years, had been convicted for misdemeanors within the previous six years, and stated that he was currently on probation for simple assault.

OPM issued its negative suitability determination in July 1979 based on appellant's delinquency in prior employment, without sufficient evidence of rehabilitation, as well as his criminal record and the fact that he still had criminal charges pending. Appellant appealed this determination to the Board's Washington, D.C., Regional Office.

In the initial decision, the presiding official found that OPM failed to prove a pattern of delinquency or misconduct in prior employment, and also failed to demonstrate that appellant's record of criminal conduct was a sufficient predictor of his unsuitability for employment in the federal competitive service. He therefore reversed OPM's determination on the basis that it was not supported by a preponderance of the evidence.

OPM petitioned for review, contending that the presiding official should have confined his review to the evidence in the administrative record before OPM when it made the suitability determination, and that he erred in conducting what amounted to a "trial de novo," substituting his judgment for that of the agency. OPM further contended that in light of the evidence, the presiding official erred in finding that: (1) appellant's alleged delinquency or misconduct in prior employment failed to show a pattern of conduct which would be incompatible with successful performance in the position for which he had applied; and (2) appellant's past criminal conduct was outweighed by sufficient evidence of rehabilitation.

The Board granted the petition for review because it raised significant issues concerning the scope of the Board's review of suitability determinations and the weight given to the evidence by the presiding official in reversing the agency's determination.

In discussing its scope of review, the Board said that since its review is not restricted to the administrative record but is a *de novo* review, the Board may properly consider evidence relating to a period of time extending beyond the date of OPM's decision to disqualify appellant, inasmuch as OPM had a "full and fair opportunity to cross-examine or otherwise rebut appellant's evidence at the Board's hearing." *Chavez v. OPM*, MSPB Docket No. DA831L09003 (May 28, 1981). Therefore, the Board found that the presiding official properly admitted and considered the testimony of appellant and his forensic psychologist at the hearing as well as evidence adduced at the hearing which may have related to a period of time extending beyond July 30, 1979, the date of appellant's disqualification by OPM.

The Board then discussed at length the issue of appellant's suitability determination. The Board held that OPM properly determined that appellant was ineligible for federal employment, after considering the absence of rehabilitation as required by 5 CFR §731.202(c). The Board reversed the initial decision and sustained OPM's adverse suitability determina-

tion on the basis of appellant's criminal record. The Board noted, however, that its finding that OPM's adverse determination was sustained does not bar appellant from reapplying for federal employment and having a new suitability determination made on the basis of his current rehabilitation status.

OTHER SEPTEMBER ISSUANCES

THE FOLLOWING PETITIONS FOR REVIEW WERE DENIED:

BILANCIA, Helen M. v. Office of Personnel Management (Docket No. PH831L8010244)
BIRCH, Dorothy v. Department of the Interior (Docket No. SF03518110374)
BLATNICK, Merryl M. v. Veterans Administration (Docket No. SF07528110375)
BRAND, James A. v. Office of Personnel Management (Docket No. DE831L8010125)
BRINK, Pauline J. v. Office of Personnel Management (Docket No. NY831L09009)
BURTON, Robert S. v. Office of Personnel Management (Docket No. DE831L8010175)
CASSIDY, Walter E. v. Defense Logistics Agency (Docket No. BN315H09016)
CHANDLER, Solomon A. v. Department of Health and Human Services (Docket No. DC07528010001)
COCCA, Umberto v. Department of the Air Force (Docket No. CH07528110005)
CORDEIRO, Guy T. v. Department of the Navy (Docket No. BN07528010039)
COUSINS, Francis v. Department of the Navy (Docket No. BN075299014)
CRUZ, Pepito R. v. Office of Personnel Management (Docket No. SF08318110217)
CRUZ, Restituto Dela v. Office of Personnel Management (Docket No. SF08318010056)
DITILLO, Kenneth v. United States Postal Service (Docket No. PH03538110190)
DOWNES, Richard L. v. Office of Personnel Management (Docket No. PH831L09004)
DUKAT, Myrna v. Department of the Navy (Docket No. PH075299082)
FAGEN, Bernard v. Social Security Administration (Docket No. NY531D8090018)
FORTIER, Gerald A. v. Office of Personnel Management (Docket No. DA831L8110045)
GRIFFIN, Florencia v. Social Security Administration (Docket No. NY531D8010131)
JOHNSON, Quincy A. v. Tennessee Valley Authority (Docket No. AT03518010194)
JOVANOVICH, Joanne v. Veterans Administration (Docket No. SE07528110028)
LINDSEY, Emery J. v. Department of the Air Force (Docket No. AT075209223)
MILLER, Rosemary v. Office of Personnel Management (Docket No. SF831L8110454)
O'REILLY, Alton v. Community Services Administration (Docket No. BN07528110063)
SHORT, Kenneth Allen v. Veterans Administration (Docket No. CH315H8010346)
SPIEGEL, Barry M. v. Department of Justice (Docket No. AT07528110001)

SWENSON, Carl J. v. Office of Personnel Management (Docket No. SE831L8010169)
WIGGINS, Gary N. v. United States Postal Service (Docket No. DA075209202)

IN THE FOLLOWING CASES, THE INITIAL DECISIONS WERE REVERSED:

BIGELOW, Arthur C. v. Office of Personnel Management (Docket No. DC831L09010)
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DISSENTING OPINIONS

JOSEPH R. BOUDREAUX v. DEPARTMENT OF THE TREASURY (Docket No. DA075209239) June 30, 1981

Board Member Ronald P. Wertheim filed a separate opinion in which he noted that the record showed a disparate penalty meted out to appellant in comparison to that received by a higher ranking agency employee for a similar offense. Member Wertheim said that the agency's effort to distinguish the two situations was unpersuasive and the record further revealed that the agency acted in part upon unsubstantiated rumors of unspecified prior incidents with which appellant was never charged and which he had no chance to rebut.

Member Wertheim noted that appellant had no prior disciplinary record and a good performance record for seven years, but appellant exhibited immaturity and poor judgment. He also noted that some discipline was clearly warranted, but said that the totality of the record left the inescapable impression that the removal penalty was an overreaction which was not justified by the evidence. See *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981). Member Wertheim said that he would affirm the charge but reduce the penalty to a suspension.

(Editor's Note: The Board's order found appellant did not meet its requirements for new evidence, found no error (as appellant alleged) in the initial decision, and found no error in the presiding official's conclusion that removal promoted efficiency of the service; see the DIGEST, volume 1, no. 9.)

JOHN DOE v. NATIONAL SECURITY AGENCY (Docket No. PH075209076) June 8, 1981

Board Member Ronald P. Wertheim filed a dissenting opinion in this case. He noted that very possibly some kinds of misconduct are so offensive to public sensibilities that people who engage in that conduct should not be allowed to remain in the federal service, regardless of whether their conduct has any

effect upon or relationship to the efficiency of the federal service. He noted that Congress did not authorize the Board to decide what kinds of misconduct deserve such proscription but commanded by law that the Board may sustain the misconduct-based removal of a government employee only for such cause as will promote the efficiency of the service. 5 U.S.C. §7513(a). He noted that, therefore, the question before the Board in this case was one of whether appellant's conduct constituted such cause. 5 U.S.C. §2302(b)(10).

Member Wertheim discussed the question of nexus at length. He stated that appellant's conduct, although reprehensible, was not of a character having inherent implications for the performance of his own or the agency's responsibilities. He noted that appellant's behavior was not notorious, it did not reflect on appellant's honesty as would theft or forgery, and it was not such as to pose a danger to others in the course of appellant's employment. He also noted that the agency had submitted no evidence indicating that appellant's performance had suffered or that his actions had any impact on the agency's execution of its mission.

Member Wertheim noted that the Board does not sit to approve or condemn the off-duty conduct of federal employees; its function is merely to determine if that conduct is cause for removal under the law. He noted that "(t)he record does not support the majority's conclusion that this purpose will be served by appellant's removal."

(Editor's note: the Board order reversed the initial decision, and sustained the appellant's removal; see the DIGEST, volume 1, no. 9.)

PETER HAYDEN v. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS (Docket No. DA075209132) February 27, 1981

Board Member Ronald P. Wertheim filed a dissenting opinion in this case on March 19, 1981, in which he noted that, in his view, the agency neither established the availability of new and material evidence

nor satisfied the Board's standards for review of a presiding official's factual findings as set forth in *Weaver v. Department of the Navy*, 2 MSPB 297.

Member Wertheim noted that the agency did not identify anything in the record that would warrant reversal of the presiding official's fact determinations and said that "a conclusionary allegation of factual error cannot be sufficient to trigger" Board review. *Weaver* at 299. Member Wertheim said that he therefore would deny the petition for review.

(Editor's note: the Board in its February order reversed the initial decision and sustained the agency's removal of the petitioner; see the DIGEST, volume 1, no. 5.)

JOSEPH T. SNIPES v. UNITED STATES POSTAL SERVICE (Docket No. AT075209206)
May 1, 1981

Board Member Ronald P. Wertheim filed a separate opinion in this case, concurring in part and dis-

senting in part. He noted that while he agreed with the Board's majority conclusion that the evidence supported the four sustained charges and fully warranted appropriate disciplinary action against appellant, he did not agree that removal was a reasonable penalty under the circumstances of the case. Considering appellant's long and outstanding service record, the fact that this was a first offense, and the nature of appellant's misconduct which clearly owed its aggravating character to his abuse of his supervisory position, Member Wertheim concluded that the ends of justice and deterrence would be adequately served by demoting appellant to a non-supervisory position and suspending him for 60 days. Member Wertheim noted that the record included nothing to suggest that such a penalty would not sufficiently gain appellant's attention; nothing to suggest that appellant was ever given any prior warning or caution about his conduct, and nothing to suggest that the agency ever considered the efficacy of such a lesser penalty.

(Editor's note: the Board's order found the penalty of removal reasonable and denied the petition for review; see the DIGEST, volume 1, no. 8.)

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DEFINITIONS:

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

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